UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSLYVANIA

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Plaintiffs,

Civil Action No. 15-cv-06478

v.

First Student Management LLC, and
First Student Inc.,
Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiffs, Maribel Rosario, et. al., and their undersigned counsel file this Response in Opposition to Defendants' Motion to Dismiss Amended Complaint and in support thereof, states the following:

PRELIMINARY STATEMENT

Plaintiffs and their counsel submit this memorandum of law in opposition to Defendants First Student Management LLC's and First Student, Inc.'s (collectively, "First Student" or "Defendants") motion for dismissal of Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion should be denied because it plainly fails to meet the standard necessary to prevail under the prism of a 12(b)(6) analysis under the federal rules.

As an initial matter, Defendants make an entirely meritless argument as to Count II. Defendants incorrectly argue that 74 of the 77 Plaintiffs should be dismissed as to Count II for what Defendants call "insufficient conclusory pleading." Simply put, Defendants wholly ignore the Court's prior order commenting on the original Complaint. In its Opinion on the prior motion to dismiss as to the original Complaint, the Court stated, "I agree that the plaintiffs' complaint fails to state a plausible FLSA overtime claim in accordance with *Davis*' pleading standard. The complaint lacks any specific factual allegations establishing that the plaintiffs worked uncompensated time in excess of forty hours in a particular workweek in which he or she also worked at least forty hours.” (See ECF Docket No. 12). However, in the Amended Complaint, Plaintiffs allege more than 37 instances of specific workweeks where Plaintiffs worked in excess of forty hours and were not paid overtime. (See ECF Docket No. 17). Defendants seem to ignore that difference in their Motion here, and instead wrongly focus on how many specific named Plaintiffs articulate a precise workweek example where they worked overtime and were not compensated. Moreover, as briefed previously and as discussed in the Amended Complaint, all Plaintiffs have alleged that they have worked overtime and were not compensated. Further, under the Fair Labor Standards Act (“FLSA”), a representative sample of Plaintiffs is all that is necessary in order to proceed in a collective action. Indeed, the very notions of a collective action and individualized specific allegations do not coincide. As the Court is well aware, many collective actions and class actions have hundreds of thousands of members. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), cert. denied, 484 U.S. 953; *In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir. 1989)(Dalkon

Shield litigation). Taken to its logical limits, individualized allegations in complaints of specific workweek violations of the FLSA would prevent any such actions from ever being litigated.

Defendants additionally argue that Counts III and IV (violations of the WPCL) should be dismissed as they are allegedly preempted by the Labor Management Relations Act ("LMRA"). Simply put, Defendants' argument is wholly without merit as to Counts III and IV because the WPCL violations brought here are not preempted by the LMRA.

As such, this Court should simply not entertain Defendants' legally insufficient arguments and should deny Defendants' Motion for dismissal as to Counts II, III and IV.

LEGAL ARGUMENT

A. STANDARD OF REVIEW

When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court merely seeks a short and plain statement of the claim showing that the pleader is entitled to relief to meet the general rule for pleading. *See* Fed. R. Civ. P. 8(a). A complaint needs only contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In reviewing such "factual matter," the allegations are construed in the light most favorable to the plaintiff and all facts alleged are assumed true. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007). Plaintiffs' Complaint plainly satisfies the modest requirement that a plaintiff provide sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1960 (2007). As the venerable Third Circuit has stated, "[t]he Supreme Court's Twombly formulation of the pleading standard can be summed up thus: stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This 'does not impose a probability requirement at the pleading stage,' but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of 'the necessary element.'" *Phillips v. County of Alleghany*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556 (2007)).

As a result, based on Plaintiffs' Complaint and the prevailing law in Pennsylvania, it is respectfully submitted that Defendants' Motion to Dismiss should be denied.

B. COUNT II OF PLAINTIFFS' AMENDED COMPLAINT STATES A CLEAR CAUSE OF ACTION THAT IS RECOGNIZED UNDER THE FLSA

In *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236 (3d Cir. 2014), the court stated the clear requirement in the Third Circuit that is necessary to sustain an FLSA claim under § 207. On this point, the court stated that, "we do not hold that a plaintiff must identify the exact dates and times that she worked overtime. For instance, a plaintiff's claim [under the FLSA] that she 'typically' worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one or more of those forty-hour weeks, would suffice [to survive a 12(b)(6) motion]." Id. at 243. The Court here in interpreting *Davis* has stated that, "[i]n *Davis*, the Third Circuit adopted a 'middle-ground approach' for pleading a plausible FLSA overtime claim. *Davis*, 765 F.3d at 241. According to the *Davis* court, a plaintiff seeking to establish a plausible FLSA overtime claim 'must sufficiently allege [forty] hours of work in a given workweek as well as some uncompensated time in excess of the [forty] hours.' Id. (citing *Lundy*, 711 F.3d at 114). Although this does not mean that 'a plaintiff must identify the exact dates and times that she worked overtime,' a plaintiff is required to 'connect the dots between bare allegations of a 'typical' forty-hour workweek and bare allegations of work completed outside of regularly scheduled shifts, so that the allegations concerning a typical forty-hour week include an assertion that the employee worked additional hours during such a week.' *Ford-Greene v. NHS, Inc.*, 106 F.Supp.3d 590, 610 (E.D. Pa. 2015)(citing Davis, 765 F.3d at 243)." Further, in dismissing Count II in the original Complaint, the Court stated that it failed to state a plausible FLSA overtime in accordance with *Davis* because "the complaint lacks any specific factual allegations establishing that the plaintiffs worked uncompensated time in excess of forty hours in a particular workweek in which he or she also worked at least forty hours." However, the Amended Complaint fully addresses this purported deficiency raised by the Court.

In the Amended Complaint, Plaintiffs allege more than 37 instances of specific workweeks where Plaintiffs worked in excess of forty hours and were not paid overtime. (See ECF Docket No. 17, ¶¶ 202-238). As such, respectfully, Plaintiffs have more than clearly met the *Davis* standard as they have specifically alleged more than 37 specific workweeks where specific Plaintiffs worked more than forty hours and were not paid overtime. In response to these specific instances where specific Plaintiffs were not paid overtime by Defendants, First Student argues that that 74 of the 77 Plaintiffs should be dismissed as to Count II because some of the named Plaintiffs did not articulate a precise workweek example where they worked overtime and were not compensated. As an initial matter, as briefed *supra* and as discussed in the Amended Complaint, all Plaintiffs have alleged that they have worked overtime and were not compensated. Further, under the FLSA, a representative sample of Plaintiffs is all that is necessary in order to proceed in a collective action.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946), the Supreme Court held that the Secretary of Labor need not present testimony from each underpaid employee; rather, it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701–02 (3d Cir. 1994); *Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995). Indeed, the very notions of a collective action and individualized specific allegations do not coincide. As the Court is well aware, many collective actions and class actions have hundreds of thousands of members. *See*, *e.g.*, *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), cert. denied, 484 U.S. 953; *In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir. 1989)(Dalkon Shield litigation). Taken to its logical limits, individualized allegations in complaints of specific workweek violations of the FLSA would prevent any such actions from ever being litigated. It would simply be impossible for every member of a collective action under the FLSA with opt-ins being added as they are discovered to comply with a standard that required the pleading to list every instance of a workweek where every plaintiff was cheated out of the overtime pay he or she had earned.

The Court need only look at how other federal courts have dealt with FLSA collective actions and discovery disputes to see how the use of representative samples is appropriate as to specific workweek examples of FLSA overtime violations. Where claims involve time records, as they do here, Courts have been clear as to where the burden lies and additionally supports the argument to limit a defendant's discovery to representative samples. In *Allen v. Bd. Of Pub. Educ.*, 495 F.3d 1306, 1315 (11th Cir. 2007), the Court on this point stated that:

Although a FLSA plaintiff bears the burden of proving

> that he or she worked overtime without compensation, "[t]he remedial nature of this statute and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). It is the employer's duty to keep records of the employee's wages, hours, and other conditions and practices of employment. *Id*. The employer is in a superior position to know and produce the most probative facts concerning the nature and amount of work performed and "[e]mployees seldom keep such records themselves." *Id*.

In *Anderson*, the Court noted that if an employer has failed to keep proper and accurate records and the employee cannot offer convincing substitutes,

> [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. Id.

> Thus, in situations where the employer's records cannot be trusted and the employee lacks documentation, the Supreme Court held "that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id*. The burden then becomes the employer's, and it must bring forth either evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the

> employee's evidence. *Id*. at 687-88. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id*. at 688.

Here, like in *Allen* and *Anderson*, Plaintiffs do not need specific workweek allegations from all 77 plaintiffs and future opt-ins to survive a motion to dismiss standard under *Davis*.

Additionally, "[i]t is well established that individualized discovery ... is inappropriate in a [FLSA] class action lawsuit." *See McCrath v. City of Philadelphia*, 1994 U.S. Dist. LEXIS 1495 at *8 (E.D. Pa. February 14, 1994). The Eleventh Circuit has also recognized that courts routinely approve the use of representative testimony in FLSA cases. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) (holding in an off-the-clock FLSA case that "it is clear that each employee need not testify in order to make out a *prima facie* case of the number of hours worked as a matter of 'just and reasonable inference'"); *see also Romero v. Fla. Power & Light Co.*, 2012 U.S. Dist. LEXIS 76146 (M.D. Fla. June 1, 2012); *Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d. Cir. 1997)("it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the *prima facie* case under the FLSA.");

Morales-Arcadio v. Shannon Produce Farms, 2006 U.S. Dist. LEXIS 66595 at *11 (S.D. Ga. August 28, 2006)(Court limited discovery to a representative sample); *Adkins v. Mid-America Growers Inc.*, 141 F.R.D. 466, 468-69 (N.D. Ill. 1992)(individualized discovery was determined to be inappropriate in a FLSA collective action, but representative testimony was permissible); *Smith v. Lowe's Home Centers, Inc.*, 236 F.R.D. 354, 357-58 (S.D. Ohio 2006)(Court denied defendant's request for individualized discovery of more than 1500 individuals and instead ordered a representative sample).

The courts actions in all of the above instances where discovery was limited to representative samples in FLSA collective actions is analogous to the requirement here imposed by the Court under *Davis* for specific allegations of workweeks where Plaintiffs worked over forty hours and were not paid overtime. The 37 instances where these violations occurred, as detailed in the Amended Complaint, are clearly representative samples of the Plaintiffs' allegations and as such are sufficient for Plaintiffs' Amended Complaint to survive Defendants' 12(b)(6) motion to dismiss. Accordingly, this Court should simply not entertain Defendants' legally insufficient arguments and should deny Defendants' Motion for dismissal as to

Count II of the Amended Complaint.

C. COUNTS III AND IV OF PLAINTIFFS' AMENDED COMPLAINT ARE NOT PREEMPTED BY THE LMRA

Defendants inaccurately argue in their motion that "[t]his Court should dismiss Plaintiffs' breach of contract claims" because they are preempted by Section 301(a) of the LMRA. *See* Defendants' Br. at p. 7. However, as an initial matter, Plaintiffs have not brought any breach of contract claims in their Amended Complaint. Rather, Plaintiffs have brought claims for violations of the WPCL. For that reason alone, this Court should deny Defendants' Motion as to these counts.

Moreover, preemption of state law claims under § 301 of the LMRA are not automatically granted in "every situation where a collective bargaining agreement comes into play." *Loewen Group Int'l v. Haberichter*, 65 F.3d 1417, 1421 (7th Cir. 1995). "Not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Loewen*, 65 F.3d at 1421. For instance, § 301 says nothing about the substantive rights a state may provide to its workers when adjudication of those rights does not involve the interpretation of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 409-410 (1988). “When the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.” *Livadas v. Bradshaw*, 512 U.S. 107, 129 (1994). While the preemptive effect of § 301 can be broad, preemption does not occur in every situation where a collective bargaining agreement is in play. The Third, Eleventh and Fifth Circuits have weighed in on this issue and stated that:

> In particular, § 301 does not preempt state law claims if they exist independently of a CBA and if their resolution does not depend on analysis of the agreement. For instance, in *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 406 (1988), the Supreme Court held that a union employee's Illinois claim of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301 because the tort had been recognized as an independent state law remedy and did not require interpretation of the labor agreement. *Id.* at 405–07.

Ciferni v. Day and Zimmerman, Inc., 529 Fed. Appx. 199 (3d Cir. 2013).

> It is important to note that ‘not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . .’ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

Bartholomew v. AGL Res., Inc., 361 F.3d 1333 (11th Cir. 2004).

> A plaintiff's state law claims will not be preempted, even when they are 'intertwined' with a CBA, so long as they are not 'inextricably intertwined' with it. *Id*. at 175 n. 20; *see Allis-Chalmers*, 471 U.S. at 213, 105 S. Ct. at 1912, 85 L. Ed. 2d 206. Indeed, either party may use a CBA to support the credibility of its claims. *Wells*, 881 F.2d at 175 n. 20.

Jones v. Roadway Express, 931 F.2d 1086, 1089 (5th Cir. 1991); *see also Thomas v. LTV Corp.*, 39 F.3d 611, 617 (5th Cir. 1994); *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994)("When the meaning of contract terms [are] not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."). Here, at this very early stage of litigation where no discovery has taken place and Defendants do not even acknowledge an agreement exists between the parties nor have they produced any of their own labor agreements which they know exist as they executed them with Plaintiffs' union, it is simply not possible for the Court to determine whether or not the state law claims for unpaid wages and overtime are "inextricably intertwined" to the agreements signed by the parties. As such, Defendants' argument here is premature and would be better suited for a motion for summary judgment after the parties have exchanged discovery and the Court can analyze the agreements and make a proper determination as to preemption.

Accordingly, this Court should dismiss Defendants' Motion as to Counts III and IV of Plaintiffs' Amended Complaint.

CONCLUSION

For all the forgoing reasons, this Court should simply not entertain Defendants' meritless arguments and should deny Defendants' Motion for dismissal of Plaintiffs' Amended Complaint as to all Counts for legal insufficiency.

FOR THE PLAINTIFF(S):

Dated: December 5, 2016

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